

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

C. NICHOLAS PEREOS aka COSTA N.
PEREOS,

Plaintiff,

v.

NATIONSTAR MORTGAGE, LLC, et al.,

Defendants.

Case No. 3:13-cv-00386-MMD-VPC

ORDER

I. SUMMARY

Before the Court are the following motions: (1) Defendant Nationstar Mortgage, LLC's Motion to Dismiss ("Motion") Plaintiff's Second Amended Complaint ("SAC") (dkt. no. 41); and (2) Plaintiff C. Nicholas Pereos's Motion for Reconsideration of Order No. 62 (dkt. no. 63). For the reasons set out below, Defendant's Motion to Dismiss is granted and Plaintiff's Motion for Reconsideration is denied.

II. BACKGROUND

This dispute arises out of Defendant's furnishing of Plaintiff's information to credit reporting agencies. The following facts are taken from the SAC and the parties' briefs.

In 2004, Plaintiff obtained a mortgage loan ("Loan") and executed a promissory note secured by a deed of trust ("Deed of Trust") to effectuate the purchase of property in Las Vegas, Nevada. (Dkt. no. 39 at 2; dkt. no. 43-1.) Defendant acquired the servicing rights on the Loan and notified Plaintiff that it would begin servicing the Loan on October 15, 2011.¹ (Dkt. no. 39 at 2; dkt. no. 43, Ex. 2.) The Deed of Trust was subsequently

¹Defendant acquired the servicing rights from Bank of America. (Dkt. no. 39 at 2.)

1 assigned to Defendant in July 2013. (Dkt. no. 41-2.) Defendant presently remains the
2 servicer of the Loan.

3 Plaintiff asserts that he made all required monthly loan payments to Defendant.
4 (Dkt. no. 39 at 2.) However, on or about the second quarter of 2012, Defendant reported
5 to “credit reporting agencies” that Plaintiff was “delinquent on [his] mortgage.” (*Id.* at 3.)
6 Plaintiff learned that his credit report contained this remark when he attempted to
7 refinance several mortgage loans. (Dkt. no. 43-1.) Plaintiff notified Defendant that he
8 was current on his payments and that Defendant reported inaccurate information to the
9 credit reporting agencies. (*Id.*) Plaintiff also made numerous requests directly to
10 Defendant to correct the reporting error, to no avail. (Dkt. no. 39 at 4; see dkt. no. 43,
11 Exh. 4.) Plaintiff alleges that Defendant reported the delinquency knowing it would
12 adversely affect his credit rating and cause him financial harm. (Dkt. no. 39 at 3.)
13 According to Plaintiff, his credit rating has been negatively impacted, causing him to be
14 unable to obtain favorable interest rates and insurance premiums. (Dkt. no. 43-1.)

15 Plaintiff asserts five state law claims: (1) “negligence, careless and intentional
16 actions by the Defendant in publishing and reporting incorrect information;” (2)
17 libel/slander; (3) “negligence and carelessness by Defendant in managing the
18 information” regarding Plaintiff’s account; (4) breach of contract; and (5) breach of the
19 implied covenant of good faith and fair dealing. (Dkt. no. 39.)

20 **III. DISCUSSION**

21 **A. Legal standard**

22 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
23 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
24 provide “a short and plain statement of the claim showing that the pleader is entitled to
25 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
26 The Rule 8 notice pleading standard requires Plaintiff to “give the defendant fair notice of
27 what the . . . claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 555
28 (citation and internal quotation marks omitted). While Rule 8 does not require detailed

1 factual allegations, it demands more than “labels and conclusions” or a “formulaic
2 recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678
3 (2009) (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). “Factual
4 allegations must be enough to raise a right to relief above the speculative level.”
5 *Twombly*, 550 U.S. at 555. When determining the sufficiency of a claim, “[w]e accept
6 factual allegations in the complaint as true and construe the pleadings in the light most
7 favorable to the non-moving party[; however, this tenet does not apply to] . . . legal
8 conclusions . . . cast in the form of factual allegations.” *Fayer v. Vaughn*, 649 F.3d
9 1061, 1064 (9th Cir. 2011) (citation and internal quotation marks omitted). Thus, to
10 survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a
11 claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (citation and internal
12 quotation marks omitted).

13 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
14 apply when considering motions to dismiss. First, a district court must accept as true all
15 well-pleaded factual allegations in the complaint; however, legal conclusions are not
16 entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements
17 of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678.
18 Second, a district court must consider whether the factual allegations in the complaint
19 allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the
20 plaintiff’s complaint alleges facts that allow a court to draw a reasonable inference that
21 the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint
22 “do[es] not permit the court to infer more than the mere possibility of misconduct, the
23 complaint has alleged — but it has not shown — that the pleader is entitled to relief.” *Id.*
24 at 679 (alteration and internal quotation marks omitted). When the claims in a complaint
25 have not crossed the line from conceivable to plausible, the complaint must be
26 dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain either direct or
27 inferential allegations concerning “all the material elements necessary to sustain
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1 recovery under *some* viable legal theory.” *Id.* at 562 (quoting *Car Carriers, Inc. v. Ford*
2 *Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1989)) (internal quotation marks omitted).

3 Moreover, although *pro se* pleadings are to be liberally construed, a plaintiff must
4 still present factual allegations sufficient to state a plausible claim for relief.² *Hebbe v.*
5 *Pliler*, 627 F.3d 338, 341–42 (9th Cir. 2010).

6 **B. Analysis**

7 Defendant argues that Plaintiff’s claims are preempted under the broad
8 preemption provision of the Fair Credit Reporting Act, specifically 15 U.S.C. §
9 1681t(b)(1)(F). In the alternative, Defendant argues that dismissal is proper because
10 Plaintiff fails to state a claim for relief. Plaintiff counters that the FCRA does not apply to
11 preempt his claims, and argues that even if his allegations are preempted, they support
12 a “viable” claim under the FCRA. Plaintiff asserts that the FCRA’s private right of action
13 provisions govern his claims. Plaintiff further argues that his claims are properly pleaded
14 under Federal Rule of Civil Procedure 8(a)(2).

15 As an initial matter, the Court declines to address Defendant’s cursory total
16 preemption argument. Defendant contends that courts have interpreted § 1681t(b)(1)(F)
17 to preempt “common law claims arising from alleged credit reporting errors” and that
18 Plaintiff’s claims are preempted because they are based on “alleged credit reporting
19 errors.” (Dkt. no. 41 at 4-5.) Defendant acknowledges in a footnote the tension between
20 § 1681t(b)(1)(F)’s broad preemption and the FCRA’s narrower preemption provision,
21 § 1681h(e) (*id.* at 4 n.2); however, Defendant fails to address how such conflict should
22 be resolved in favor of total preemption in light of the specific claims alleged in this case,
23 including the general allegations of willful conduct (see dkt. no. 39 ¶ XV). Indeed, while
24 Defendant points out this conflict, its argument ignores this friction altogether. The Court
25 thus declines to address the conflict between these two preemption provisions, including

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27 ²The Court notes that, although it extends to Plaintiff the liberal pleading rules
28 associated with *pro se* plaintiffs, Plaintiff is an attorney.

1 Defendant's cursory total preemption argument without the benefit of more in-depth
2 briefing.

3 The Court will address whether Plaintiff's claims fall within the FCRA's private
4 right of action provisions before turning to Defendant's argument that Plaintiff has failed
5 to state a claim.

6 **1. Private right of action under the FCRA**

7 Congress enacted the FCRA, 15 U.S.C §§ 1681-1681x, "to ensure fair and
8 accurate credit reporting, promote efficiency in the banking system, and protect
9 consumer privacy." *Gorman v. Wolpoff & Abramson, LLP*, 584 F.3d 1147, 1153 (9th Cir.
10 2009) (quoting *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52 (2007)) (internal quotation
11 marks omitted). Among other requirements, the FCRA mandates that "consumer
12 reporting agencies ["CRA"] adopt reasonable procedures for meeting the needs of
13 commerce for consumer credit . . . in a manner which is fair and equitable to the
14 consumer, with regard to confidentiality, accuracy, relevancy, and proper utilization of
15 such information." 15 U.S.C. § 1681(b). To ensure the accuracy of credit reports, the
16 FCRA places certain duties on the sources that provide credit information to CRAs,
17 referred to as "furnishers of information."³ *Gorman*, 584 F.3d at 1153; 15 U.S.C.
18 § 1681s-2.

19 Section 1681s-2 establishes two categories of responsibilities for furnishers of
20 information. *Gorman*, 584 F.3d at 1154. The first category covers the "[d]uty of furnishers
21 of information to provide accurate information." 15 U.S.C. § 1681s-2(a). For example,
22 furnishers of information are prohibited from reporting credit information if there is a
23 "reasonable cause to believe" that it is inaccurate. 15 U.S.C. § 1681s-2(a)(1)(A). The
24 second category describes the "[d]uties of furnishers of information upon notice of
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26 ³"The most common . . . furnishers of information are credit card issuers, auto
27 dealers, department and grocery stores, lenders, utilities, insurers, collection agencies,
28 and government agencies." *Gorman*, 584 F.3d at 1153 n.7 (quoting H.R. Rep. No. 108-
263, at 24 (2003)) (internal quotation marks omitted).

1 dispute.” 15 U.S.C. § 1681s-2(b). These duties, however, “arise only after the furnisher
2 receives notice of [a] dispute from a CRA; notice of a dispute received directly from the
3 consumer does not trigger furnishers’ duties under subsection (b).” *Gorman*, 584 F.3d at
4 1154 (explaining that “notice of dispute” refers to “when a person who furnished
5 information to a CRA receives notice from the CRA that the consumer disputes the
6 information”) (citation omitted); see 15 U.S.C. § 1681i(a)(2).

7 The alleged conduct here falls within the FCRA’s statutory provisions because
8 Plaintiff’s claims are premised on allegations that Defendant negligently furnished
9 inaccurate and derogatory information about his loan payment history to the CRAs. See
10 15 U.S.C. § 1681s-2(a). Defendant qualifies as a “furnisher of information” under the
11 FCRA and is, therefore, required to comply with the provisions of § 1681s-2. However,
12 because Plaintiff directly notified Defendant that it furnished inaccurate information to the
13 CRAs, rather than disputing the report with the CRAs, Plaintiff has triggered § 1681s-
14 2(a), but not subsection (b).

15 Although the FCRA expressly provides a private right of action for willful or
16 negligent noncompliance with its terms, 15 U.S.C. §§ 1681n-1681o, the FCRA precludes
17 a private right of action for claims arising under § 1681s-2(a). 15 U.S.C. § 1681s-2(c)
18 (“Except [for circumstances not relevant here], sections 1681n and 1681o of this title do
19 not apply to any violation of . . . subsection (a) of this section, including any regulations
20 issued thereunder.”); see *Gorman*, 584 F.3d at 1154; *Nelson v. Chase Manhattan Mortg.*
21 *Corp.*, 282 F.3d 1057, 1059-60 (9th Cir. 2002). Furnishers’ duties under § 1681s-2(a) are
22 enforceable only by federal or state agencies. See 15 U.S.C. § 1681s-2(d); *Gorman*, 584
23 F.3d at 1154. As the Ninth Circuit has explained, Congress limited enforcement of
24 § 1681s-2(a) violations to these agencies because “Congress did not want furnishers of
25 credit information exposed to suit by any and every consumer dissatisfied with the credit
26 information furnished.” *Nelson*, 282 F.3d at 1060.

27 Plaintiff argues that he has alleged a “viable” claim under the FCRA, but the SAC
28 does not allege any FCRA violation, let alone the particular provision under which he is

1 seeking relief. Accepting the allegations in the SAC as true, Plaintiff's allegations of
 2 Defendant's conduct as a furnisher of information would trigger liability under § 1681s-
 3 2(a), for which no private right of action exists.⁴ See discussion *supra*. As explained
 4 above, consumers like Plaintiff must follow the requirements of § 1681s-2(b) to preserve
 5 a private right of action. However, Plaintiff has not alleged that he complied with the
 6 requirements of § 1681s-2(b). Plaintiff cannot circumvent these statutory requirements
 7 by asserting state law claims based on conduct otherwise regulated under the FCRA.
 8 See *Woods v. Prot. One Alarm Monitoring, Inc.*, 628 F. Supp. 2d 1173, 1185-86 (E.D.
 9 Cal. 2007) (holding that plaintiffs did not allege a defamation claim because they failed to
 10 trigger § 1681s-2(b) by disputing a reporting inaccuracy only with the furnisher of the
 11 information). Accordingly, Plaintiff's common law claims for negligence (first and third
 12 claims) and libel/slander (second claim) are dismissed. The Court will, however, allow
 13 Plaintiff leave to amend to the extent he can allege facts showing that he complied with
 14 15 U.S.C. § 1681s-2(b).

15 2. **Contract Claims**

16 Defendant argues that Plaintiff has failed to state a claim with respect to his two
 17 contract claims: breach of contract (fourth claim) and breach of the implied covenant of
 18 good faith and fair dealing (fifth claim). The Court agrees.

19 To state a claim for breach of contract, a plaintiff must plausibly allege "(1) the
 20 existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result
 21 of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919–20 (D. Nev. 2006)
 22 (citing *Richardson v. Jones*, 1 Nev. 405 (1865)). Plaintiff asserts that Defendant is
 23 "responsible for the contractual provisions contained in the contracts . . . in connection
 24 with the promissory note, deed of trust and other related mortgaging documents" and
 25 that Defendant "breached said contracts" by reporting the inaccurate credit information to
 26

27 ⁴Plaintiff is not precluded from alleging that Defendant violated other FCRA
 28 provisions that create a private right of action.

1 the CRAs. (Dkt. no. 39 at 7.) Without further factual enhancement, this naked assertion
 2 of liability does not satisfy Rule 8(a)(2). Plaintiff fails to establish that any of the allegedly
 3 breached contracts contained a provision or term addressing the conduct alleged in the
 4 SAC. Furthermore, Plaintiff has not sufficiently identified which contract(s) Defendant
 5 breached based upon the alleged conduct, but has instead listed all potential contracts
 6 between the parties. This claim will be dismissed.

7 Under Nevada law, “[e]very contract imposes upon each party a duty of good faith
 8 and fair dealing in its performance and its enforcement.”⁵ *A.C. Shaw Constr. v. Washoe*
 9 *Cnty.*, 784 P.2d 9, 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). To
 10 state a valid claim for breach of the implied covenant of good faith and fair dealing, a
 11 plaintiff must show: (1) plaintiff and defendant were parties to a contract; (2) defendant
 12 owed a duty of good faith to plaintiff; (3) defendant breached that duty by performing in a
 13 manner that was unfaithful to the purpose of the contract; and (4) plaintiff’s justified
 14 expectations were thus denied. *See Perry v. Jordan*, 900 P.2d 335, 338 (Nev. 1995).
 15 Plaintiff alleges that Defendant breached the implied covenant of good faith and fair
 16 dealing by reporting the false credit information to the CRAs. Similar to Plaintiff’s breach
 17 of contract claim, Plaintiff has failed to identify which contract, if any, establishes the
 18 basis for Defendant’s breach of the implied covenant of good faith and fair dealing.
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21 ⁵After reviewing Plaintiff’s opposition brief, it is unclear whether Plaintiff intended
 22 to allege a claim for tort-based or contract-based breach of the implied covenant of good
 23 faith and fair dealing, as Plaintiff appears to argue that there is a special relationship
 24 between the parties within the negligence section of his brief. (See dkt. no. 43 at 11.) To
 25 maintain a tort-based claim for breach of the implied covenant, there must be a “special
 26 relationship between the tort-victim and the tortfeasor.” *State, Univ. & Cmty. Coll. Sys. v.*
 27 *Sutton*, 103 P.3d 8, 19 (Nev. 2004). Tort liability is appropriate “where the party in the
 28 superior or entrusted position has engaged in grievous and perfidious misconduct.” *Id.*
 (citation and internal quotation marks omitted). Plaintiff’s Complaint fails to state a claim
 for tort-based breach of the implied covenant of good faith and fair dealing because he
 does not allege that the parties had a special relationship or that their dealings were
 anything more than an arm’s length transaction. *See Enriquez v. J.P. Morgan Chase*
Bank, N.A., No. 2:08-cv-01422-RCJ-LRL, 2009 WL 160245, at *7 (D. Nev. Jan. 22,
 2009).

1 Plaintiff has also failed to plead facts suggesting that Defendant's alleged conduct was
2 unfaithful to the purpose of that contract. This claim will similarly be dismissed.

3 **C. Leave to Amend**

4 Plaintiff requests leave to amend. The court should "freely give leave [to amend]
5 when justice so requires." Fed. R. Civ. P. 15(a)(2). However, leave need not be granted
6 where amendment: "(1) prejudices the opposing party; (2) is sought in bad faith; (3)
7 produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp. v.*
8 *Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (citation omitted).

9 Defendant has not argued that it will be prejudiced if Plaintiff is given leave to
10 amend. Additionally, the Court cannot find that amendment would be futile here. Good
11 cause appearing, leave to amend is granted.

12 **IV. CONCLUSION**

13 The Court notes that the parties made several arguments and cited to several
14 cases not discussed above. The Court has reviewed these arguments and cases and
15 determines they did not warrant discussion as they do not affect the outcome of the
16 Motions.

17 It is ordered that Defendant's Motion to Dismiss (dkt. no. 41) is granted. Plaintiff
18 may file an amended complaint within fifteen (15) days. Plaintiff is reminded that if he
19 intends to allege a violation under the FCRA, his amended complaint should specify the
20 provision of the FCRA for which a private right of action is available and the conduct that
21 led to the violation. Failure to file an amended complaint will result in dismissal of
22 Plaintiff's claims with prejudice.

23 It is further ordered that Plaintiff's Motion for Reconsideration (dkt. no. 63) is
24 denied as moot without prejudice so that Plaintiff may refile the motion if the case
25 proceeds.

26 DATED THIS 18th day of February 2015.

27 
28 MIRANDA M. DU
UNITED STATES DISTRICT JUDGE